

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION**

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|----------------|---|--------------------------|
| KEVIN VARNER, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| vs. |) | CAUSE NO. 3:05-CV-365 PS |
| |) | |
| JOHN VANNATTA, |) | |
| |) | |
| Respondent. |) | |

OPINION AND ORDER

Petitioner Kevin Varner submitted a petition for writ of *habeas corpus* pursuant to 28 U.S.C. § 2254. However, the petition must be dismissed because Varner has not exhausted his state court remedies. In his petition, Mr. Varner indicates that he filed a state court motion to correct his erroneous sentence, and that motion is still pending.

28 U.S.C. 2254(b)(1)(A) forbids a federal court from excusing the exhaustion requirement unless the state's corrective process is incapable of protecting the rights of the applicant. Here, the state's corrective process is capable of protecting the rights of the applicant. Mr. Varner is in no danger of losing his right to file a writ for federal habeas corpus relief, because the statute of limitations is being tolled while his state court proceedings are pending.

For all of the reasons stated this petition is **DISMISSED** without prejudice for failure to exhaust state court remedies. Mr. Varner's motion for leave to proceed in forma pauperis is **DENIED**.

SO ORDERED.

ENTERED: June 22, 2005

s/ Philip P. Simon
PHILIP P. SIMON, JUDGE
UNITED STATES DISTRICT COURT